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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff,

vs.

COUNTY OF ELKO, Defendants,

THE WILDERNESS SOCIETY and GREAT OLD BROADS FOR WILDERNESS, Intervenors and Cross-Claimants,

3:99-CV-547-MMD-WGC
ELKO COUNTY'S REPLY TO UNITED STATES RESPONSE TO MOTION FOR SUMMARY JUDGMENT (DKT. 610)

COMES NOW, Elko County, by and through its attorneys, TYLER J. INGRAM, District Attorney for the County of Elko, KRISTIN A. McQUEARY, and CURTIS F. MOORE, Deputy District Attorneys, and GARY D. WOODBURY, Esq., and submits the following Points and Authorities in support of this Reply, together with all pleadings and papers on file herein.

POINTS AND AUTHORITIES

1. Authority For Elko County's Reply

As a respondent to a motion for summary judgment, Elko County would not normally be afforded a reply brief. The scheduling order allows one to be filed. Specifically, DKT 604 provides that "Intervenor's motions are due by 12/12/2016, with responses due 1/31/2017 and replies due 2/22/2017." Given that the Court specified that the replies, in the plural, would be due on February 22, 2017, and that the interests of Elko County and the United States are not fully aligned, Elko County took the wording to mean that Elko County was afforded a reply to the United States' Response to Intervenor's Motion for Summary Judgment.

2. PACER Error

At the time this reply is being written, PACER identifies DKT 610 as a Response to Motion for Summary Judgment as filed by the Amicus, Office of the Attorney General, State of Nevada. The Document, when opened, appears to be only the Response of the United States, not the State of Nevada as Amicus Curiae. This erroneous designation should be corrected.

3. The Department Of Justice Has Plenary Authority To Settle This Lawsuit

The United States' response to Intervenors' Motion for Summary Judgment, DKT 605, acknowledges the August, 2016, decision of this Court, and concedes Intervenors are entitled to summary judgment apparently under TWS' cross claim theories -- that the settlement agreement violates federal law because it transfers real property not in accordance with procedures required under federal law, or that the United States Department of Justice arbitrarily and capriciously evaluated the evidence that Elko County had such an easement, or the Department of Justice arbitrarily and capriciously did not understand the legal ramifications of the Settlement Agreement. The United States also concedes TWS is entitled to summary judgment, voiding Elko County's Quiet Title Act, 28 U.S.C. 2049, counter claim.

The United States' Response makes no effort to support the Department of Justice's previous position that if the Agreement did transfer real property to Elko County it was authorized to do so in light of the plenary authority of the Department of Justice to settle cases and the provisions of the Quiet Title Act, DKT 611. Intervenors argued that the Department of Justice acted outside of its authority in entering into the Settlement Agreement with Elko County, DKT 605. The United States effectively concedes this point (although Elko County does not).

However, neither the United States nor the Intervenors have cited a single statute that the Department of Justice has violated. Elko County still asserts that an unambiguous expression of Congressional intent to limit Department of Justice discretion in settling Quiet Title litigation doesn't exist in FLPMA, 43 U.S.C 1701, in the Quiet Title Act itself, or in the provisions of 28 U.S.C. 516-519. Without such an unambiguous expression of intent, Congress has not limited the plenary authority of the Department of Justice to settle lawsuits arising under these statutes. United States v. International Union of Operating Engineers, 638 F.2d 1161, 1162 (9th Cir. 1979)

The United States makes no argument differentiating the validity of the Settlement Agreement standing alone, versus the Settlement Agreement incorporated into the Consent Decree. The United States makes no argument that Elko County did not need to prove it has an RS 2477 easement in the South Canyon as part of the compromise that a settlement agreement is.

The United States acknowledges at page 2, of its Response, that it did not intend to transfer an easement through the Settlement Agreement. It fails to acknowledge that Elko County by entering into the agreement and dismissing its quiet title counterclaim gave up the right to argue to the contrary. The United States cites no authority and makes no argument that under law, a contract should be construed in accordance with the intent of the parties to it.

In short, the United States is essentially admitting it acted arbitrarily and capriciously across the board. That position undermines the United States' responsibility to Elko County to support the parties' contract. The good faith and fair dealing requirements of general contract law apply to the United States' government as well as to private parties, Clark v. United States, 73 U.S. 543, 545-46 (1867), United States v. Behan, 110 U.S. 338, 346 (1884).

The lack of any claim of justification for the actions of the Department of Justice has the appearance of conceding that TWS should receive attorney fees from the federal government under the Equal Access to Justice Act, 28 U.S.C. 2412.

The United States argues in a head note on page 3 that the "Provisions of the Settlement Agreement Unrelated to the Alleged R.S. 2477 Right-of-Way Remain Valid." In short, the agreement is severable.

Under the terms of the agreement in Section VI(B), Elko County has already dismissed its Quiet Title Act counter claim with prejudice. The United States informs the Court that its Clean Water Act and Trespass claims against Elko County were dismissed in the agreement, as well. How the Court can both sever the agreement as requested by the United States and award summary judgment on Elko County's dismissed counter claim is not argued nor explained by the United States.

Elko County's acknowledgement in it response to the Motion for Summary Judgment that it had no legal argument against summary judgment on its Counterclaim presupposed the Court would invalidate the Settlement Agreement in its entirety.

4. Offer of Compromise

Elko County objects to the Department of Justice making an offer of compromise in its Response to the Motion for Summary Judgment of. The offer of compromise has nothing to do with summary judgment and it is obviously intended by the United States to force Elko County into conceding settlement is reasonable or possible. The United States is attempting to infer to the Court that Elko County is not litigating in good faith nor making reasonable claims, or is being unreasonably litigious. Elko County is attempting to uphold the benefits of its bargain in good faith. The United States is the party that is back tracking. Remember, Elko County was joined to this litigation October 21, 1999 by the Court in DKT 5.

Elko County is satisfied that a variety of this Court's decisions including the Order regarding Threshold issues DKT 507 and the Order following the evidentiary hearing DKT 600 are not legally nor factually supportable. More importantly, the holdings set a precedent for subsequent decisions that will adversely impact not only Elko County, but other local government claims to RS 2477 rights of way, and the discretion of the Department of Justice to settle R.S. 2477 lawsuits without full blown trials.

Elko County is also satisfied that the South Canyon Road will remain open. The United States and the Intervenors have already litigated this issue in the 9th Circuit Court. The Intervenors lost in Great Old Broads for Wilderness v. Kimbell, 709 F.3d 836 (9th Cir. 2013).

DATED this 22nd day of February, 2017.

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CERTIFICATE OF SERVICE

I certify that on the 22nd day of February, 2017, a true and correct copy of the foregoing, of the Elko County Reply to United States Response to Motion for Summary Judgment was served on the following by e-filing and by delivery to:

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